



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO:62436/21

- 1. REPORTABLE: NO
- 2. OF INTEREST TO OTHER JUDGES: NO
- 3. REVISED: NO

DATE: 1 August 2023

A handwritten signature in black ink, appearing to be "N. Nkomo", is written over a large black rectangular redaction box.

In the matter between:

NU AFRICA DUTY FREE SHOPS (PTY) LTD

Applicant

And

THE COMMISSIONER FOR THE SOUTH
AFRICAN REVENUE SERVICES

Respondent

JUDGMENT

Botha AJ:

Introduction

1. The applicant applies for an order in the following terms:
 - “1) Reviewing and setting aside the respondent’s detention notice dated 8 May 2020.
 - 2) Reviewing and setting aside the respondents seizure notice dated 19 January 2021.
 - 3) Reviewing and setting aside the Custom and Excise National Appeals Committee’s decision dated 9 June 2021, when it confirmed the seizure as referred to in prayer to above.
 - 4) Remitting the matter back to the Respondent for reconsideration in terms of section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000
 - 5) Cost of suit, and
 - 6) Further end or alternative relief
- 2 The respondent disputes the relief claimed by the Applicant.
- 3 The relevant facts of this matter are to a large extent common cause between the parties and can be summarized as follows: -
 - 3.1 The Applicant is a licensed duty-free retailer with custom and excise warehouses in Cape Town, a special custom and excise warehouse in Hatfield Pretoria and during 2020, a storage warehouse in an office park in Lynnwood Pretoria.

- 3.2 The warehouses are held in terms of section 19A and 21 of the Custom and Excise act 91 of 1964 read together with rules 19 A and 21 of the Customs and Excise rules.
- 3.3 The Applicant, as a duty-free retailer, imports and exports duty free alcohol products.
- 3.4 On 27 March 2020 a National Lockdown at level 5 commenced in South Africa to combat the novel coronavirus pandemic.
- 3.5 An embargo on the sale, transport and export of alcohol products was in effect.
- 3.6 Level 4 of the Lockdown took effect on 2 May 2020 and employees of the applicant could attend to the warehouses for the first time since 27 March 2020
- 3.7 On 2 May 2020 the applicant exported its first post- lockdown consignment of alcohol to Zimbabwe.
- 3.8 SARS conducted a routine inspection at the Lynnwood warehouse on 7 May 2020
- 3.9 the following day, 8 May 2020, SARS again visited the Lynnwood warehouse and discovered that in the cargo holds of two trucks, leased by the applicant, a substantial amount of alcohol products was stored.
- 3.10 The trucks were parked in close proximity of the warehouse in a public area.
- 3.11 The alcohol consisted of a Smirnoff vodka consignment and a consignment of After Dark whiskey.
- 3.12 On the same day a notice of detention in respect of the discovered alcohol was issued.
- 3.13 On 6 June 2020 SARS issued a letter of intent to seize, the reason being that it was of the view that the detained liquor have been irregularly dealt with in

terms of section 20 (bis) and that offences have been committed in terms of section 80(1)(c) of act 91 of 1964

3.14 Numerous correspondence to and fro between the parties followed.

3.15 On 19 January 2021, SARS confirmed the seizure of the goods.

3.16 1 March 2021 the applicant files its internal administrative appeal (IAA) against the SARS decision.

3.17 The appeal was dismissed on 10 June 2021.

3.18 8 December 2021 this application was launched.

Background and chronology

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The background can be succinctly summarized as follows:

4.1 During January 2020 the Applicant received an export order from Zambia for a consignment of Smirnoff vodka comprising of 2400 cases (Smirnoff consignment)

4.2 The Smirnoff consignment was received from the Cape Town warehouse at the Lynwood warehouse on 11 March 2020

4.3 Payment from the purchaser's agent was not forthcoming and as a consequence the Applicant requested the cancellation of the Smirnoff consignment from SARS.

4.4 The Applicant also placed an order for the import of 918 cases of After Dark Fine Grain Whiskey (Whiskey consignment) which was received at the Lynwood warehouse on 24 March 2020.

4.5 It was then proclaimed that a Level 5 National Lockdown will commence on 27

March 2020.

- 4.6 This was an unprecedented situation in South Africa and the Applicant was left on the horns of a dilemma in the sense that there was not enough storage space inside the warehouse for the Smirnoff and Whiskey consignments.
- 4.7 The Applicant arranged that the consignments be transported by Reddy Cargo to their storage facilities. Reddy is also a duty-free enterprise.
- 4.8 Reddy Cargo was however only able to send one of its trucks to collect and remove the Smirnoff consignment. As a consequence, not the whole of the Smirnoff consignment could be taken away to the warehouse(s) of Reddy
- 4.9 The result was that the Applicant did not have enough storage space inside the warehouse to store the excess alcohol products on the premises of the warehouse. The Applicant had to improvise and was forced to store 16 pallets of the Smirnoff consignment onto one of its trucks and 12 pallets of the Whiskey consignment onto another of its trucks. Both trucks were parked outside the warehouse in close proximity. It needs to be mentioned that the trucks *in casu* were soft sided trucks meaning that the sides were covered with a durable plastic sheet that was tightened with tensioners. Access was then gained when the tensioners were loosened at the sides and entrance could also be gained from the back of the truck.
- 4.10 On 27 March 2020 the level 5 National Lockdown commenced with meant inter alia that an embargo on the sale, export and transport of alcohol products was in effect.
- 4.11 On 2 May 2020 the level of the lockdown was adjusted to level 4 and the Applicant could for the first time attend to its warehouse where it was discovered that the two trucks had been tampered with. On both trucks the tensioners on the left side had been broken.
- 4.12 On the same date the Applicant resumed its normal business and exported a consignment of liquor to Zimbabwe. That liquor so exported was stored within

the warehouse.

4.13 On 7 May 2020 SARS conducted a routine inspection at the Lynwood warehouse and Mr De Waal (SARS official) observed the two trucks.

4.14 The next day, Mr Ndala, also a SARS official, came to the warehouse. It is an obvious conclusion that Mr De Waal briefed him on the two trucks. Ndala immediately on arrival enquired about the trucks. The trucks were opened and he observed the alcohol products stored inside. The alcohol was detained on the same day.

4.15 6 June 2020: - SARS issues a Letter of intent to seize. In the letter the Applicant was advised that he has the right to submit evidence and submissions as to why the alcohol was stored in the trucks and parked in a public area instead of inside a bonded warehouse.

4.16 Reasons and submissions were forwarded and numerous correspondence between the parties followed but on 19 January 2021 SARS confirmed the seizure of the goods.

4.17 On 1 March 2021 the Applicant filed its Internal Administrative Appeal (IAA) against the SARS decision.

4.18 The appeal was dismissed on 10 June 2021.

4.19 On 8 December 2021 this application for review was launched.

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5.1 It appears from the Letter of Intention to seize that the Commissioner of SARS is of the view that the alcohol products had been dealt with in contravention of the provisions of Sec 20(4) (bis) of the Customs Act and consequently dealt with irregularly as contemplated by Sec 87 (1) of the said Act. Therefore the

alcohol products were liable for forfeiture.

5.2 The Applicant in essence advanced two reasons why the goods were stored in the trucks namely that with the sudden onset of the National Lockdown, the Applicant was left without space inside the warehouse as per the confluence of circumstances mentioned and secondly, when the warehouse was attended to on 2 May 2020 it was discovered that there was tampering which resulted in the breaking of the tensioners of the trucks and the Applicant alleged that this prohibited access to the trucks up until such time the tensioners were repaired.

5.3 The Applicant addressed the court as to the correct approach when interpreting fiscal legislation. I completely agree that when dealing with tax legislation ordinary rules of grammar, ordinary legal principles and terms must be considered and the wording in the statute must be given their ordinary grammatical meaning.

See: Purveyors South Africa Mine Services (PTY) LTD v Commissioner for the South African Revenue Services 2021 ZASCA 170(SCA)

Commissioner of SARS v United Manganese of Kalahari (PTY)LTD 2020 (4) SA 428 (SCA)

5.4 The Act does not define the word “diversion”. The Applicant *in casu* relies heavily on the judgement in the Desmonds case.

See: SARS v Desmonds Clearing and Forwarding Agents CC 2006 (4) SA 284 (SCA)

5.5 I believe the Desmonds case is distinguishable. The Desmonds case turned on Sec 18(13)(a) of the Customs Act which prohibits the diversion, without the permission of the Commissioner, of goods removed in bond to a destination other than the one declared on entry for removal in bond.

5.6 In Desmonds the Respondent was the clearing and forwarding agent and the

transporter of goods in bond. In that case there was problems with the roadworthiness of the trailers. The question before court was whether the temporary storage of the trailers loaded with the goods in bond, which had been uncoupled from the truck, could be seen to constitute a diversion to a destination other than that declared on entry. The court found that Desmond gave a reasonable explanation for the separation of the truck from the trailers. It was held that Sec 18 (13) (a) does not forbid a detour but forbids a deviation to another destination than the one declared on entry.

5.7 The Applicant also put up the defence that it could not access the trucks onto which the alcohol products were stored after the Level 5 Lockdown because of the tampering with the chain tensioners. It appeared however from the affidavit of the technician who conducted the repairs that only the tensioners on the left sides were broken.

5.8 The possibility to enter from the right-hand side or the back of the trucks was not even addressed by the Applicant. The Respondent argued that as a drastic last measure the plastic sheeting could have been cut to gain access. This was however not done.

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6.1 During argument Mr Van der Merwe conceded that the National Lockdown created an unprecedented state of affairs in South Africa, but submitted that even if initially there was no other option but to store the alcohol products in the trucks, on 2 May 2020, after the consignment of liquor to Zimbabwe was exported, there must have been space inside the warehouse. The liquor was however left inside the trucks and therefor there was reason to believe, and it proved that the alcohol products were dealt with irregularly which justified seizure and forfeiture in terms of the Act.

6.2 a Question was directed to counsel for the Applicant that it appears that the Applicant was lackadaisical and careless in its storing of the alcohol stored in

the trucks during the period 2 May 2020 -8 May 2020. No proper effort was made by Applicant to remove the liquor from the trucks and to re-store it inside the bonded warehouse. This question remained unanswered, but it was contended that the Respondent interpreted and applied the Act too strict.

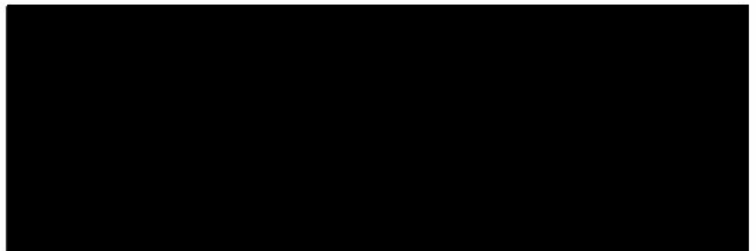
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7.1 It is undeniable that the Applicant was given ample opportunity to make representations to SARS and the Applicant also made use of the Internal Appeal process.

7.2 I am of the opinion that the process followed was fair and that all the relevant considerations were taken into account. Consequently, in my view, the application must fail.

I make the following order:

- 1) The application is dismissed.
- 2) The Applicant is ordered to pay the costs, such costs to include the costs consequent upon the employ of counsel.



GB Botha

Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 5 June 2023

Judgment delivered: 1 August 2023

Attorneys for applicant: Savage Jooste
& Adams

Counsel for applicant: Adv K Kollapen

Attorneys for respondent: MacRobert
Attorneys

Counsel for respondent: Adv MP van
der Merwe SC